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No. 97-1011

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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JERROLD ZIMAN and ELLEN ZIMAN,
*Petitioners,*
v.
THE STATE OF NEW YORK and the
NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,
*Respondents.*
and
JERROLD ZIMAN and ELLEN ZIMAN,
*Petitioners,*
v.
THE STATE OF NEW YORK,
*Respondent.*

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**On Petition for a Writ of Certiorari to the New York State Court of Appeals**

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## PETITIONERS' REPLY BRIEF

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## ARGUMENT

### I. NEW YORK STATE'S CLAIM THAT THE STATE LAW RULING BELOW BARS SUPREME COURT REVIEW IS AS UNPERSUASIVE AS IT IS CURSORY

This case raises constitutional issues of due process and property rights. The presence of an independent state law ruling below affects only the second of these issues, namely, whether the Zimans suffered a taking of their property. In its opposition, New York State attacks as "meritless" the Zimans' claim that this state law ruling "established a novel rule of state law". Opp 9. Nonetheless, even the State admits that "the precise issue addressed in the matter at bar had not been previously decided . . . ." *Id.*

That "precise issue" was whether, under New York law, a case timely filed in the wrong court may subsequently be refiled in the Court of Claims within six months of the first court's dismissal. This is a procedure which state law on its face clearly allows, but which the Court of Claims disallowed. Pet. 16, 9a-11a. The inapplicability of the cases relied upon by that court was extensively briefed by the Zimans on appeal, but their arguments received no mention whatsoever in the Appellate Division's cursory affirmance. Pet. 16-18, 5a.

Now, in its opposition, the State takes the same approach; it makes absolutely no attempt to show that the Zimans' reliance on statutory law was somehow invalid and that they therefore failed to meet the "unjustified reliance" criterion of *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958). Instead, the State simply declares that nothing novel occurred in the way of judicial rulings.

Admittedly, the numbing details of state procedural law rarely merit attention by this Court. Nonetheless, in this case the relevant state law, CPLR § 205(a), makes it perfectly clear that the route followed by the Zimans was proper. Pet. 16. The State's attempt to defend a

perfunctory ruling to the contrary with an equally perfunctory brief should be rejected.

## II. GIVEN THE CONSTITUTIONAL RULINGS ISSUED BY THE COURTS BELOW, THE STATE'S ATTEMPT TO CHARACTERIZE THIS CASE AS AN INSIGNIFICANT LANDLORD-TENANT DISPUTE IS A GROUNDLESS EFFORT TO EVADE THE IMPORTANT ISSUES OF OWNER OCCUPANCY AND COMPELLED TENANCIES RAISED IN THIS ACTION

The State characterizes the issues raised in this action as stemming solely from "the litigation of a landlord-tenant dispute which ultimately results in the full relief sought by the landlord." Opp. 13. It attempts to minimize its own role by calling itself a mere "jural agent", involved in nothing more than refereeing a rental dispute between the Zimans and their tenants. Opp. 12.

These cavalier characterizations are groundless. The delay at issue in this case is not the time that Zimans spent litigating against their tenants, but the time they spent fighting the State and its housing agency.[1] As the

[1] Six and one-half years elapsed from the time the Zimans first filed their first eviction applications in early 1984, to the time that DHCR finally complied with the New York Court of Appeals ruling in *Ziman I* and granted those applications in October, 1990. Pet. 6, 15a. At least four months of that delay were arguably due to administrative malice. Pet. 13. The Zimans also sought compensation for two statutory waiting periods totaling nine months. Pet. 15a. Contrary to the State's suggestion, however, they did *not* seek compensation for the time spent litigating against their tenants in Housing Court over the exercise of their eviction certificates. *See* Pet. 6-7.

In holding that the Fifth Amendment's requirement of just compensation applies to temporary takings, this Court excepted the "normal delays" involved "in obtaining building permits . . . and the like". *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321 (1987). By no stretch of the imagination, however, can the time period at issue here be excused as a "normal delay".

record makes clear, the State was directly responsible for the two major elements of the Zimans' predicament: 1) the enactment of the Twenty Year Law, which retroactively destroyed the Zimans' legitimate expectations of being able to readily occupy their home on the basis of owner occupancy; and 2) DHCR's subsequent misreading of the eviction law and mishandling of the Zimans' eviction applications, which forced the Zimans into a lengthy and ultimately successful court battle over their right to evict on other grounds. The fact that this was a legal battle against the State is clear from the very caption of *Ziman I: Ziman v. Division of Housing and Community Renewal,* 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), *aff'd,* 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990).

Had these State actions *not* occurred, and had the Zimans' dispute been purely with their tenants (as the State pretends it was), then this would be an entirely different case. It is precisely because the Zimans' dilemma was created by retroactive legislation and improper agency action that it presents these constitutional issues.

The State also suggests that since the Zimans were eventually able to evict their tenants, they received the "full relief" they sought, and that therefore their challenge to the Twenty Year Law is "simply beside the point". Opp. 13. This, however, was not how the lower courts in this case viewed the matter. The Zimans raised due process challenges to the Twenty Year Law in two courts below, and neither of these courts had any difficulty reaching the merits of those challenges. App. 5a, 19a-20a. Those decisions, coupled with the more extensive reasoning set out in the New York case law that they expressly rely upon, provide an ample basis for this Court to examine the drastic change in property rights suffered by the Zimans.

The State skirts the issue of a taking by physical occupation, arguing that

> "even though the Zimans undertook [their landlordship] with an intent that it be short-lived, petitioners upon purchase of occupied property willingly assumed responsibility for the rights of their tenants . . . ." Opp. 12.

This conveniently ignores the fact that, when the Twenty Year Law was enacted five months after the Zimans bought their home, the rights of their tenants were expanded so drastically that they destroyed the Zimans' statutory expectation of owner occupancy. Far from being "an inappropriate vehicle" (Opp. 13) for consideration of the due process and takings issues raised by this retroactive annulment of basic property rights, the instant case is clear opportunity for this Court to resolve those issues. By doing so, this Court would finally answer the basic question which it so suggestively left open in *Yee v. City of Escondido,* 503 U.S. 519 (1992); that is, the validity of a statute which "compel[s] a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy." *Id.* at 528, *citing FCC v. Florida Power Corp.,* 480 U S. 245, 251-52 n.6 (1987); *Nollan v. California Coastal Commission,* 483 U.S. 825, 831-32 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting).

The State fares even worse on the issue of regulatory takings, where it claims that the Zimans failed to show a loss of "all economically beneficial use of their property". Opp. 12. This argument ignores the fact, affirmed in *Ziman I* on the basis of "unrefuted evidence", that the Zimans' landlordship cast them into financial hardship—a situation in which they were forced to remain for nearly eight years. 76 N.Y.2d 721, 557 N.Y.S.2d 876. This Court has itself pointed out that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision . . . ." *Lucas v. South Coastal Council,* 505 U.S. 1003, 1016 n.7 (1992). Even at its core, however, that rule almost certainly encompasses the